

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 05-10088-MBB

JULIANNE MARIE EVANS
Plaintiff,

VS.

NANTUCKET COMMUNITY SAILING, INC.,
RONAN O'SIOCHRU and DONNCHA KIELY
Defendants.

DEFENDANTS' MOTION IN LIMINE TO COMPEL PAYMENT OF
DEFENDANTS' EXPERT WITNESS FEES

Now come the defendants, Nantucket Community Sailing, Inc., Ronan O'Siochru, and Donncha Kiely, in the above captioned action, by and through their undersigned counsel, Clinton & Muzyka, P.C. and respectfully move this Honorable Court to compel the plaintiff to pay the defendant's expert witness fees pursuant to Fed.R.Civ.P. 26(b) (4) (C),

As grounds in support of their motion, the defendants submit the following for the Court's consideration.

BACKGROUND

On November 1, 2006, plaintiff's counsel obtained the deposition of Robert I. Henkin, M.D. in Washington, D.C.

On April 3, 2007, defense counsel notified plaintiff's counsel that the defendants sought payment for Dr. Henkin's time for preparing and attending his

deposition. Defense counsel submitted a copy of Dr. Henkin's invoice, totaling \$1,750.00, to the plaintiff's counsel. See **Exhibit A** attached hereto.

On April 3, 2007, plaintiff's counsel advised that the plaintiff would pay for Dr. Henkin's attendance at the deposition, but withheld payment for Dr. Henkin's preparation for the deposition. See **Exhibit B** attached hereto. Subsequent telephone conversations with plaintiff's counsel failed to resolve the issue.

ARGUMENT

Fed.R.Civ.P. 26(b) (4) (C) requires the plaintiff to pay to the defendants for their expert witness' "reasonable fee for time spent in responding" to discovery. "[T]ime spent in responding" to discovery includes the defendant's expert fees incurred in preparing for and attending his deposition. **Am. Steel Prods. Corp. v. Penn Cent. Corp.**, 110 F.R.D. 151, 153 (S.D.N.Y.1986) ("Defendants shall pay plaintiff's accounting expert a reasonable fee for his time spent in giving and in preparing for his deposition."). Many district courts hold that the time a doctor spends in reviewing a medical file prior to a deposition is recoverable as time spent in responding to discovery. See e.g., **Hose v. Chicago and North Western Transp. Co.**, 154 F.R.D. 222 (S.D. Iowa

1994); **Hurst v. U.S.**, 123 F.R.D 319, 321 (D. S.D. 1988);
Boos v. Public Health Services, 212 F.R.D. 578 (D. Kan. 2002); **Collins v. Village of Woodridge**, 197 F.R.D. 354 (D. Ill. 1999); **Patterson Farm, Inc. v. City of Britton**, 22 F.Supp.2d 1085 (D. S.D. 1998).

Accordingly, the defendant seeks to recover the expert fees of Dr. Henkin incurred in his review of the plaintiff's medical chart in preparing for his deposition.

WHEREFORE, the defendants, Nantucket Community Sailing, Inc., Ronan O'Siochru, and Donncha Kiely, pray that this Honorable Court compel the plaintiff to pay Dr. Henkin's expert witness fees of \$1,750.00.

Respectfully submitted
by their counsel,
CLINTON & MUZYKA, P.C.

"/s/Thomas J. Muzyka"
Thomas J. Muzyka
BBO NO. 365540
Terence G. Kenneally
BBO NO: 642124
One Washington Mall
Suite 1400
Boston, MA 02108
(617) 723-9165

Dated: November 8, 2007

EXHIBIT A

Terence G. Kenneally

Nantucket
Comm. Sailing Evans

From: Terence G. Kenneally
Sent: Tuesday, April 03, 2007 4:09 PM
To: 'Alan Cantor'
Subject: RE: Evans v. NCS et al.
Attachments: HENKIN INVOICE 11-2-2006.pdf

Dear Alan,

We refer to the above matter and enclose a copy of Dr. Henkin's invoice concerning his preparation and attendance at his deposition last year.

Please make arrangements to reimburse our firm as required under Fed.R.Civ.P. 26(b) (4).

Should you have any questions, please advise.

Best regards,

Terence G. Kenneally
Clinton & Muzyka, P.C.
One Washington Mall, Suite 1400
Boston, MA 02108
Tel: 617-723-9165
Fax: 617-720-3489
Email: tkenneally@climmuzyka.com

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CENTER FOR MOLECULAR NUTRITION AND SENSORY DISORDERS
TASTE AND SMELL CLINICROBERT I. HENKIN, M.D., Ph.D.
Director

INVOICE

November 2, 2006

Thomas J. Muzyka
Clinton & Muzyka, PC
One Washington Mall, Suite 1400
Boston, MA 02108Re: Julianne Evans
Legal and Medical Fees

DATE	WORK	TIME	FEE
10/31/06	Review of Evan's chart	1 hr.	\$ 500.00
11/1/06	Deposition	2 h. 30 min.	<u>\$1,250.00</u>

\$ 1,750.00

EXHIBIT B

Terence G. Kenneally

From: Alan Cantor [acantor@swartzlaw.com]
Sent: Tuesday, April 03, 2007 4:18 PM
To: Terence G. Kenneally
Subject: RE: Evans v. NCS et al.

Terry, we'll pay for the depo, but not the prep. In my experience, the universal practice is that retaining counsel pays for the prep. Before I ok the \$1250, let me know if your client is going to make an issue over this. Alan.

From: Terence G. Kenneally [mailto:tkenneally@clinmuzyka.com]
Sent: Tuesday, April 03, 2007 4:09 PM
To: Alan Cantor
Subject: RE: Evans v. NCS et al.

Dear Alan,

We refer to the above matter and enclose a copy of Dr. Henkin's invoice concerning his preparation and attendance at his deposition last year.

Please make arrangements to reimburse our firm as required under Fed.R.Civ.P. 26(b) (4).

Should you have any questions, please advise.

Best regards,

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Email: tkenneally@clinmuzyka.com

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